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# In the Supreme Court of the United States

October Term, 1981

COMMONWEALTH OF PENNSYLVANIA,
*Cross-Petitioner-Appellant*

v.

ANN GORSUCH, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
*Respondent-Appellee*

*On Writ of Certiorari to the United States Court of Appeals for the Third Circuit*

## CROSS-PETITION FOR WRIT OF CERTIORARI BY THE COMMONWEALTH OF PENNSYLVANIA

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## QUESTION PRESENTED

1. Does the Clean Air Act require the Administrator of the Environmental Protection Agency to determine the interstate impacts of air pollution in her review and approval of each state implementation plan?

## ADDITIONAL PARTIES TO CASE BELOW

A. Appalachian Power Company

B. Council of Senior West Virginians

C. Group Against Smog and Pollution, Inc.

D. Monongahela Power Company

E. Monongahela County Citizens for Clean Air

F. Mountain Community Union

G. Ohio Power Company

H. State of West Virginia

I. West Virginia Citizens Action Group, Inc.

J. West Virginia Highlands Conservancy, Inc.

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## OPINIONS BELOW

The Judgment Order of the United States Court of Appeals for the Third Circuit, dated September 22, 1981, did not contain an official court opinion. The text of that order is attached hereto as Appendix A.

The final actions of the U.S. Environmental Protection Agency, review of which is sought, are published at:

45 Fed. Reg. 74478 (November 10, 1980), Appendix B.

45 Fed. Reg. 74520 (November 10, 1980), Appendix C.

## JURISDICTION

The Judgment Order of the United States Court of Appeals for the Third Circuit was entered on September 22, 1981. The State of West Virginia filed a petition for rehearing, which was denied on October 21, 1981. The Commonwealth of Pennsylvania filed a petition for rehearing *en banc,* which was denied on October 28, 1981.

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1), by the Petition for Writ of Certiorari filed by the State of West Virginia (No. 81-1361). The Commonwealth of Pennsylvania received the Petition for Writ of Certiorari on January 20, 1982. The Commonwealth respectfully files this Cross-Petition for Writ of Certiorari under Rule 19.5 of the Rules of this Court.

The jurisdiction of the United States Court of Appeals for the Third Circiut, below, was invoked to review a final action of the U.S. Environmental Protection Agency by the timely filing of petitions for review under Section 307(b) of the Clean Air Act, 42 U.S.C. §7607(b).

## STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Section 110(a)(2) of the Clean Air Act, 42 U.S.C. §7410(a)(2), provides:

IMPLEMENTATION PLANS

Sec. 110(a)(1) Each State shall, after reasonable notice and public hearings, adopt and submit to the Administrator, within nine months after the promulgation of a national primary ambient air quality standard (or any revision thereof) under section 109 for any air pollutant, a plan which provides for implementation, maintenance, and enforcement of such primary standard in each air quality control region (or portion thereof) within such State. In addition, such State shall adopt and submit to the Administrator (either as a part of a plan submitted under the preceding sentence or separately) within nine months after the promulgation of a national ambient air quality secondary standard (or revision thereof), a plan which provides for implementation, maintenance, and enforcement of such secondary standard in each air quality control region (or portion thereof) within such State. Unless a separate public hearing is provided, each State shall consider its plan implementing such secondary standard at the hearing required by the first sentence of this paragraph.

(2) The Administrator shall, within four months after the date required for submission of a plan under paragraph (1), approve or disapprove such plan for each

portion thereof. The Administrator shall approve such plan, or any portion thereof, if he determines that it was adopted after reasonable notice and hearing and that—

(A) except as may be provided in subparagraph (I) (i) in the case of a plan implementing a national primary ambient air quality standard, it provides for the attainment of such primary standard as expeditiously as practicable but (subject to subsection (e)) in no case later than three years from the date of approval of such plan (or any revision thereof to take account of a revised primary standard); and (ii) in the case of a plan implementing a national secondary ambient air quality standard, it specifies a reasonable time at which such secondary standard will be attained;

(B) it includes emission limitations, schedules, and timetables for compliance with such limitations, and such other measures as may be necessary to insure attainment and maintenance of such primary or secondary standard, including, but not limited to transportation controls, air quality maintenance plans, and preconstruction review of direct sources of air pollution as provided in subparagraph (D);

* * *

(E) it contains adequate provisions (i) prohibiting any stationary source within the State from emitting any air pollutant in amounts which will (I) prevent attainment or maintenance by any other State of any such national primary or secondary ambient air quality standard, or (II) interfere with measures required to be included in the applicable implementa-

tion plan for any other State under part C to prevent significant deterioration of air quality or to protect visibility, and (ii) insuring compliance with the requirements of section 126, relating to interstate pollution abatement;

* * *

Section 126 of the Clean Air Act, 42 U.S.C. §7426, provides:

INTERSTATE POLLUTION ABATEMENT

Sec. 126. (a) Each applicable implementation plan shall—

(1) require each major proposed new (or modified) source—

(A) subject to part C (relating to significant deterioration of air quality) or

(B) which may significantly contribute to levels of air pollution in excess of the national ambient air quality standards in any air quality control region outside the State in which such source intends to locate (or make such modification).

to provide written notice to all nearby States the air pollution levels of which may be affected by such source at least sixty days prior to the date on which commencement of construction is to be permitted by the State providing notice, and

(2) identify all major existing stationary sources which may have the impact described in paragraph (1) with respect to new or modified sources

and provide notice to all nearby States of the identity of such sources not later than three months after the date of enactment of the Clean Air Act Amendments of 1977.

* * *

Section 307(b)(1) of the Clean Air Act, 42 U.S.C. §7607(b)(1), provides:

GENERAL PROVISIONS RELATING TO ADMINISTRATIVE PROCEEDINGS AND JUDICIAL REVIEW

* * *

307(b)(1) . . . A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 110 or section 111(d), any order under section 111(j), under section 112(c), under section 113(d), under section 119, or under section 120, or his action under section 119(c)(2) (A), (B), or (C) (as in effect before the date of enactment of the Clean Air Act Amendments of 1977) or under regulations thereunder, or any other final action of the Administrator under this Act (including any denial or disapproval by the Administrator under title I) which is local or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit. Notwithstanding the preceding sentence a petition for review of any action referred to in such sentence may be filed only in the United States Court of Appeals for the District of Columbia if such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination. Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulga-

tion, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise.

* * *

## STATEMENT OF THE CASE

This case involves EPA's approval of regulations increasing sulfur dioxide emission limitations in the West Virginia state implementation plan. The nature of this case is complex, and requires some explanation.

On May 31, 1972 (37 F.R. 10901), EPA formally approved sulfur dioxide emission limitations for West Virginia, submitted by the State of West Virginia in its state implementation plan for sulfur dioxide. *See* 40 C.F.R. §52.2520. These emission limitations were designed to *insure* the attainment and maintenance of the national primary and secondary ambient air quality standards for sulfur dioxide.[1] It is undisputed that the original sulfur dioxide emission limitations for power plants in West Virginia of 1972, if enforced, would be adequate to protect both the primary and secondary ambient air quality standards.

On January 25, 1978 and on September 11, 1978, West Virginia submitted to EPA revisions of its state implementation plan for sulfur dioxide. The revisions significantly increased allowable sulfur dioxide emissions, but West Virginia asserted that the new emission limits would

[1] The primary and secondary national ambient air quality standards are established by statute and by regulation. *See* §109 of the Clean Air Act, 42 U.S.C. §7409. See also the discussion of implementation plans in *Train v. Natural Resources Defense Council*, 421 U.S. 60, 95 S.Ct. 1470, 43 L.Ed. 2d 731 (1975). The importance of meeting national ambient air quality standards is articulated by this Court in *Union Electric Co. v. EPA*, 427 U.S. 246, 96 Stat. 2518, 49 L.Ed. 2d 474 (1976).

result in the attainment and maintenance of both the national primary and secondary ambient air quality standards for sulfur dioxide within West Virginia. Later that year, on November 9, 1978, EPA approved the amended West Virginia implementation plan and allowed the deletion of certain emission limitations from the West Virginia implementation plan. (43 F.R. 62249).

On January 5, 1979, the Commonwealth of Pennsylvania and the Council of Senior West Virginians, Inc., and other citizen groups, filed petitions for review of EPA's action. After the Petitioners below set forth their concerns to EPA counsel, on June 1, 1979, EPA voluntarily requested a remand, which was granted by the United States Court of Appeals for the Third Circuit.

As the result of the remand, EPA undertook two additional actions more than a year later which were published in the Federal Register on November 10, 1980 (45 F.R. 74478, Appendix B, and 45 F.R. 74520, Appendix C). In one notice, EPA approved the amended plan as adequate to meet the primary sulfur dioxide ambient air quality standard. In the other notice, EPA notified the State of West Virginia of a "deficiency" in its implementation plan for the secondary sulfur dioxide ambient air quality standard, but did not disapprove that portion of the revision.

EPA's actions of November 10, 1980, failed to address fundamental issues concerning interstate impacts of air pollution. EPA had still not informed the public how it would implement Section 110(a) (2) (E) of the Clean Air Act (the interstate pollution abatement provisions), 42 U.S.C. §7410(a) (2) (E), and, indeed, EPA had made no finding that the West Virginia plan conformed with

Section 110(a)(2)(E). EPA proceeded to approve the deletion of emission limits in the West Virginia plan which would have protected the secondary sulfur dioxide ambient air quality standard from violation. The long-range transport of, or interstate impact of, air pollutants is the very issue that EPA has avoided discussing or analyzing in this case. Pennsylvania can enact stricter emission limitations for major sources within its jurisdiction, but unless EPA controls pollution entering into Pennsylvania, out-of-state sources will consume air resources in Pennsylvania. The Mitchell plant is located 15 miles from Pennsylvania and the Harrison plant is located 25 miles from Pennsylvania.

The Cross-Petitioner Commonwealth of Pennsylvania requested review of these actions of EPA in the U.S. Court of Appeals for the Third Circuit. Petitioner-Appellant State of West Virginia, in a petition filed later, requested review of these actions in the U.S. Court of Appeals for the Fourth Circuit. The U.S. Court of Appeals for the Fourth Circuit transferred West Virginia's petition to the Third Circuit, where the cases were consolidated. The U.S. Court of Appeals for the Third Circuit dismissed all the petitions for review filed in a single order. Its judgment order is the subject of this cross-petition (Appendix A).

## REASONS FOR GRANTING THE WRIT

### I. Review of the Decision Below by This Honorable Court Is Necessary To Clarify Federal-State Relationships Under the Clean Air Act

The statutory scheme in the Clean Air Act for the control of air pollution creates a unique federal-state relationship, since control measures established at the federal level are determined by state plans. Within nine months of EPA's adoption of a national ambient air quality standard for a specific pollutant, a state must submit an implementation plan which demonstrates that the state will "attain and maintain" the national standard. In reviewing a plan, the Administrator of EPA must determine whether it meets twelve criteria set forth in §110(a)(2), 42 U.S.C. §7410(a)(2). If the Administrator determines that it does meet those criteria, she is required to approve it. *Train v. Natural Resources Defense Council*, 421 U.S. 60 (1975). Conversely, if she determines that it does not, she must disapprove it. *Manchester Environmental Coalition v. EPA*, 612 F.2d 56 (2d Cir. 1979); *see Bunker Hill Co. v. EPA*, 572 F.2d 1286 (9th Cir. 1977).[2]

[2] The criteria that apply to the initial promulgation of an implementation plan apply to a revision. Section 110(a)(3), 42 U.S.C. §7410(a)(3); *Florida Power & Light Co. v. Costle*, 650 F.2d 579 (5th Cir. 1981). These criteria also apply to an implementation plan that has been promulgated or revised by EPA, rather than by a state, pursuant to §110(c), 42 U.S.C. §7410(c).

When the Clean Air Act was first enacted in 1970, there was no provision in the Act which required a state to consider the possibility of interstate pollution. Thus, a state could legally maximize emissions within the state, and, as long as the emissions did not cause a local violation of national ambient standards, EPA had to approve the state implementation plan regardless of the impact of the sources, individually or in the aggregate, upon air quality in a neighboring state. The lack of accountability of in-state emitters for out-of-state impact was one of the problems Congress considered in the 1977 Amendments to the Clean Air Act (codified at 42 U.S.C. §7401 *et seq.*).

Amendments to the Clean Air Act, in 1977, however, imposed specific new duties on EPA to control and abate interstate air pollution. Pub. L. 95-95, 91 Stat. 685 ("the 1977 Amendments"). In §110(a)(2)(E), Congress made consideration of the interstate transport of air pollutants a mandatory part of approval of any state implementation plan (SIP). Section 110(a)(2)(E) provides for approval of a plan if the Administrator determines that:

> it contains adequate provisions (i) prohibiting any stationary source within the State from emitting any air pollutant in amount which will (I) prevent attainment or maintenance by any other State of any such national primary or secondary ambient air quality standard, or (II) interfere with measures required to be included in the applicable implementation plan for any other State under part C to prevent significant deterioration of air quality or to protect visibility, and (ii) insuring compliance with the requirements of section 126, relating to interstate pollution abatement. . . .

The 1977 Amendments provided that EPA, as the responsible federal agency, would have a new role of leadership in addressing and resolving problems caused by the transport of pollutants between states. *See* §101(a)(4), 42 U.S.C. §7401(a)(4). This task is to be accomplished by EPA under its statutory duty to analyze and evaluate the interstate air pollution effects of each state implementation plan. Since 1977, however, EPA has taken no action to implement these requirements of the Act. Unless EPA is held to its duties under §110(a)(2)(E), the interstate abatement provisions will be rendered ineffective and the congressional intent that affected states have a remedy in the SIP development process will be defeated.

The 1977 Amendments also required the Administrator to review and revise pre-existing SIPs to bring them into conformance with new requirements of the Act within one year. Section 406(d)(2), Pub. L. 95-95, set out as a note to 42 U.S.C.A. §7501. Thus, by mid-1978, the Administrator was required by law to have reviewed each SIP for conformity with the new provisions of §110(a)(2) and to have made a determination that the SIP as a whole does not unlawfully contribute to pollution in other states in violation of §110(a)(2)(E). Before the Administrator could approve any new SIP revision under §110(a)(3), she must have determined first that the underlying SIP as a whole complied with the 1977 Amendments, and additionally that the proposed revision conformed with the Act.

Since the decision in *Train v. Natural Resources Defense Council,* 421 U.S. 60 (1975), this Honorable Court has not examined the federal-state relationship in the administration of the Clean Air Act. The 1977 Amend-

ments impose a new tension on the federal-state relationship, and this is an opportune time to re-examine the Act.

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## II. EPA Has Not Made the Required Determination Under the Clean Air Act That the West Virginia State Implementation Plan Will Not Cause Interstate Air Pollution

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The Cross-Petitioners submit that the Clean Air Act requires an explicit determination of compliance with the interstate pollution abatement provisions.

In this case, EPA is required to make an affirmative determination concerning the approvability of a state implementation plan under Section 110(a) (2) (E) of the Act. Section 110(a) (2) begins:

> The administrator shall approve such plan, or any portion thereof, *if he determines* that it was adopted after reasonable notice and hearing and that . . .

We are not dealing with a portion of the Act which is silent on EPA's duty to make a determination. EPA's failure to make a necessary determination should not be passed over, by reason of deference to an administrative agency. Various district courts have granted summary judgments to plaintiffs where EPA has failed to determine the adequacy of a state implementation plan with respect to the 1977 Amendments to the Clean Air Act. *See, e.g., Citizens for a Better Environment v. Costle,* F. Supp. , 116 ERC 1162 (N.D. Ill., April 15, 1981). Two years ago, this Honorable Court, through a plurality opinion, remanded an OSHA benzene exposure rule due to the

failure of the Secretary of Labor to make the requisite threshold finding. *Industrial Labor Department, AFL-CIO v. American Petroleum Institute,* 448 U.S. 607 (1980). In that case, the Court found that the Occupational Safety and Health Act, 29 U.S.C. §652(8), required the Department of Labor to determine that a standard adopted under the Act be "reasonably necessary or appropriate to provide safe or healthful employment and places of employment." A majority of this Court held that the Secretary of Labor had not made the necessary finding required by §3(8):

> It is noteworthy that at no point in its lengthy explanation did the Agency quote or even cite §3(8) of the Act. It made no finding that any of the provisions of the new standard were 'reasonably necessary or appropriate to provide safe or healthful employment and places of employment.'
>
> 448 U.S. at 638.

This Court examined the record in detail to determine whether this threshold finding had been made, but its review did not uncover a finding resembling that required by the statute. Justice Stevens noted that he could not infer this critical finding on behalf of the Secretary of Labor, although the record was voluminous.

> Because our review of this case has involved more detailed examination of the record than is customary, it must be emphasized that we have neither made any factual determinations of our own, nor have we rejected any factual findings made by the Secretary. We express no opinion on what factual findings this record might support, either on the basis

> of empirical evidence or on the basis of expert testimony; nor do we express any opinion on the more difficult question of what factual determinations would warrant a conclusion that significant risks are present which make promulgation of a new standard reasonably necessary or appropriate. *The standard must, of course, be supported by the findings actually made by the Secretary, not merely by findings that we believe he might have made.*
>
> 448 U.S. at 659 (emphasis supplied).

Thus, this Court rejects any notion that the required determination can be made implicitly.

In this case, the Cross-Petitioners have asked EPA to make a finding that the West Virginia state implementation plan is adequate under Section 110(a) (2) (E) of the Clean Air Act. EPA failed to make any such finding. (45 F.R. 74478, Appendix B).

A review of EPA's action will reveal no finding that approximates the finding required by Section 110(a) (2) (E) of the Clean Air Act. Despite Pennsylvania's repeated requests to EPA to examine the air quality impacts of relaxation of standards to determine whether the revision conformed with Section 110(a) (2) (E) of the 1977 Amendments, EPA made no determination that the West Virginia plan conformed with Section 110(a) (2) (E). The only determination by EPA under Section 110(a) set forth in the notice of final rulemaking was the determination under Section 110(a) (2) (A) that the plan meets the requirement of attainment and maintenance of the national primary ambient air quality standard for $SO_2$ in West Virginia.

The EPA final action does not state that the West Virginia plan adequately protects Pennsylvania as required by Section 110(a) (2) (E). Moreover, EPA explicitly determined in its final rulemaking that the West Virginia $SO_2$ control strategy is not adequate to ensure attainment and maintenance of the secondary national ambient air quality standard for $SO_2$ in West Virginia (45 F.R. 74520, Appendix C). Consequently, EPA's failure to determine whether the West Virginia plan is adequate to protect the secondary national ambient air quality standard in Pennsylvania is even more delinquent. Nowhere in the rulemaking is there a finding by EPA that the state implementation plan "contains adequate provisions prohibiting any stationary source within West Virginia from emitting sulfur dioxide in amounts which will prevent attainment or maintenance in Pennsylvania of the sulfur dioxide primary or secondary ambient air quality standard," as is required by Section 110(a) (2) (E).

In its two Rationale Documents prepared by the Agency to support its approval of the SIP, there are no analyses of the long-range transport of $SO_2$ and particulate and there is no mention of any determinations pursuant to Sections 110(a) (2) (E) or 126 of the Act. The only reference to interstate pollution is a statement of EPA's opinion that it has no duty to consider interstate transport of sulfates.

Since the Administrator did not make the necessary determinations, the Court of Appeals should have remanded this case to the Administrator to make the required determinations. The Court cannot substitute its judgment for the Administrator's in making determinations. *See Securities and Exchange Commission v. Chenery Corp.,*

318 U.S. 80 (1943). EPA's failure to make a determination that the West Virginia SIP revision complies with Section 110(a)(2)(E) makes the SIP revision invalid.

The importance of controlling interstate air pollution is clearly recognized and was one of the major concerns of Congress in strengthening the interstate provisions of the Clean Air Act.[3] EPA has failed to demonstrate even

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[3] The legislative history of the Clean Air Act Amendments of 1977 demonstrates Congress' concern over the problem of interstate air pollution and EPA's failure to implement an effective control program. The House Report on the Clean Air Act Amendments of 1977 contained the following language concerning Section 110(a)(2)(E):

> The problem of interstate air pollution abatement has long been a source of concern, but to date an adequate solution has been elusive.
>
> * * *
>
> In the committee's view, however, the existing law (as interpreted by the Administrator) is an inadequate answer to the problem of interstate air pollution.
>
> * * *
>
> Section 309 of the committee bill revises section 110(a)(2)(E) of the act and adds a new section 126 to the act. These new provisions are intended to establish an effective mechanism for prevention, control, and abatement of interstate air pollution. H.R. Rep. No. 95-294, at 329-30, 2 U.S. Cong. and Adm. News (1977) at 1408-09.

The House Committee report also recognized the problems inherent in the long-range transport of air pollution:

> Clearly, then, while emissions may not be 'significant' in the area of origin, when transported to another area and combined with pollutants from other areas, air quality may be drastically degraded.

H.R. Rep. No. 95-294, at 135, 24 S. Code Cong. and Adm. News (1977) at 1214.

minimal consideration of interstate impacts in its actions in this case. It is vitally important to the future of interstate air pollution control that this Court accept this writ and hold that EPA must affirmatively find compliance with Section 110(a) (2) (E) in approving a SIP revision.

Unless and until EPA provides a proper legal and technical finding for its November 9, 1978 proposal, and makes these findings explicit in its final action, the proposed revision to the EPA approved implementation plan should be vacated and remanded. Pennsylvania requests this Court to accept the writ and rule on the vital national issue of EPA's duty to consider the impacts of interstate air pollution under the Clean Air Act.

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## CONCLUSION

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For the above stated reasons, Cross-Petitioner respectfully requests this Court to issue a Writ of Certiorari.

Respectfully submitted,
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES

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